Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Comments -- Accelerated Docket for Complaint Proceedings	)	CC Docket No. 96-238
	)	
	)	

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") hereby files these comments on the proposed accelerated docket for complaint proceedings pursuant to the Public Notice published December 12, 1997 (DA 97-2178).

(1) THE NEED FOR AN ACCELERATED DOCKET.

ALTS supports the creation of an accelerated docket procedure for complaint ajudications. Practical experience, as well as scholarly literature, demonstrates that incumbents can and do delay the introduction of competition through the gaming of litigation, including the Commission's current complaint process.

Incumbents are skilled in resisting complaince with statutory requirements and negotiated (or arbitrated) agreements right up to the point where concrete penalties are threatened. Knowing that the current Section 208 process is lengthy,

expensive, and unpredictable, incumbents feel free to "push the envelope" on their compliance obligations way past the point where Congress intended or sound policy would dictate. When challenged in complaint proceedings at either the state or Federal level, their inevitable pattern is to consume as much time and resources as possible until the new entrant either has to surrender to the cost of continuing litigation.

Even if a complainant does intend to pursue its complaint remedy to the end, incuments fully understand how to exploit the competitive pressures facing new entrants. Knowing new entrants face tight deadlines in striving to reach markets before other potential competitors, as well as needing to meet their business plan schedules that assure access to further capital, incumbents skillfully "back off" their violations just enough and at just the right time so that new entrants have little choice but to throw in the complaint towel.

An accelerated docket procedure would seriously mitigage this potential for ILEC gaming by reducing the cost, timing, and contingency of the complaint process. The mere knowledge that CLECs could obtain prompt and relatively inexpensive relief from the complaint process would reduce ILEC gamesmanship before the Commission ever needed to take any concrete action. Furthermore, the knowledge that most complaints could not be killed through delay and expense, and thus would likely result in hard findings

-- findings that could reveal a pattern of anticompetitive behavior enforceable in antitrust courts -- would further deter violations by incumbents.

The speed, efficiency, and predictability of an accelerated ajudication procedure for complaints thus clearly would have its greatest benefits for disputes among incumbents and new entrants. Once the Commission gains experience with such a procedure, it could profitably be extended to other areas.[1]

(2) Minitrials -- ALTS supports the minitrial concept as an appropriate approach to improving the cost effectiveness of the complaint remedy. The key to success in applying such a mechanism is an early determination by a knowlegeable trier-of-fact of the particular evidentiary dimimensions of specific complaints. Many, perhaps even most, complaints would lend themselves to the mini-trial approach, much as Judge Greene required that the massive issues pleaded in the government's original case against the Bell System be boiled down to concrete factual disputes.

---

[1] ALTS applauds the approach of working cooperatively with state commissions to ensure that respective jurisdictional concerns are fully accomodated. Reviewing potential conflicts in advance would cure most practical concerns, and perhaps permit pragmatic solutions in more ambiguous cases, such as permiting an accelerated ajudication to also serve as a state arbitration, or to form the basis for a state declaratory judgment.

Fundamental fairness, and the need to sustain any "minitrial" results on appeal, do require that any ajudicatory "gatekeeper" spot the relatively few disputes that might require greater factual amplification. By taking care to separate the factually simple cases from more complex disputes at the start, the Commission would insure that a minitrial process operates fairly, and successfully.

(3) Discovery, Pre-Filing Procedures, Pleading Requirements, and Status Conferences -- Discovery is perhaps the principal weapon used to make the formal complaint process lengthy, expensive, difficult, and unpredictable as an instrument of justice. From ALTS' perspective, the issue here is not the particular discovery rules adopted -- though the suggested rules from the Eastern District of Texas would be beneficial, as would be those from the Northern District of Illinois. Rather, the issue is whether the Commission can create an environment in which trial ajudicators are willing to take on the task of bounding discovery requests (to prevent death by a thousand paper cuts), and to punish litigants and their attorneys who are inexplicably slow or sloppy in producing relevant evidence.

It is not the quality of particular discovery rules (or pleading requirements, status conferences, or any other tool available to an ajudicator of fact) that will make a difference,

however, but rather the institutional context in which those ajudicators operate. Federal trial procedures are basically the same nationwide, but those federal courts that have chosen to make their trial procedures more expeditious and cost-effective have largely been successful. ALTS suggests this success is less the result of any particular rules these courts have adopted, than the result of their institutional commitment.

If ALJs are properly recognized for conducting efficient, cost-effective, discovery procedures, filing requirements, pleading requirement, status conferences, etc., that are upheld by the courts, then they will find and apply appropriate procedures to achieve those results. If, on the other hand, hearing officers do not win appoval when they find and apply such techniques -- and in particular, when they apply sanctions to litigants who fail to obey their rulings -- the best rules in the world will make little difference.

(4) Damages -- ALTS agrees with the request for comments that damages might well be bifurcated from a determination of liability. However, because there may be situations where a damage determination is simple -- or where the need for a quick remedy is obvious -- the trier of fact should have some discretion to include damages in an accelerated adjudication.

CONCLUSION

For the foregoing reasons, ALTS requests that the Commission adopt its comments concerning an accelerated docket procedure.

Respectfully submitted,

By: Richard J. Metzger/FMFB

Richard J. Metzger
General Counsel
Association for Local
Telecommunications Services
888 17th Street, N.W., Suite 900
Washington, D.C. 20006
(202)969-2583

January 12, 1998

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of the Association for Local Telecommunications Services was served January 12, 1998, on the following persons by first-class mail or hand service, as indicted.

M. Louise Banzon

Richard J. Metzger
Chief, Common Carrier
Bureau
Federal Communications
Commission, Room 500
1919 M Street, N.W.
Washington, D.C. 20554*

Enforcement Task Force
Office of General Counsel
FCC, Room 650-L
1919 M Street, N.W.
Washington, D.C. 20554*

Enforcement Division
Common Carrier Bureau
FCC, Room 6120
2025 M Street, N.W.
Washington, D.C. 20554*

ITS Inc.
1231 20th Street, N.W.
Washington, D.C. 20036